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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 171

THE UNITED STATES, *Petitioner,*

v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

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July, 1933.

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OPINION BELOW.

The opinion of the Court of Claims on demurrer (R. 12) is reported in 38 Fed. (2d) 139 and on the merits (R. 16) in 2 Fed. Supp. 778.

JURISDICTION.

The judgment of the Court below was entered on March 13, 1933 (R. 20). A petition for a writ of certiorari and motion to remand were filed June 13, 1933. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925. (43 Stat. 936.)

QUESTIONS PRESENTED.

The questions presented as stated by the Petitioner, with the correctness of which the Respondent begs to disagree, are as follows:

1. Whether Respondent may recover Manufacturers' Excise Tax paid under the provisions of Sections 900 of the Revenue Acts of 1918 and 1921 and Section 600 of the Revenue Act of 1924, when such taxes appear to have been collected from Respondent's customers and were not proved to have been returned to said customers as provided in Section 424 of the Revenue Act of 1928.

2. Whether under Section 424 of the Revenue Act of 1928 the Court below had jurisdiction to enter a judgment for the refund of Manufacturers' Excise Taxes when it appeared that it was not established to the satisfaction of the Commissioner of Internal Revenue that said taxes had not been collected directly or indirectly from Respondent's customers, or that said taxes had been returned to Respondent's customers.

3. Whether the Court of Claims followed permissible practice in making an ultimate finding of fact that the ignition coils manufactured and sold by the Respondent were not primarily adapted, or specially designed for use in automobiles, motor cycles, automobile trucks or automobile wagons within the meaning of the applicable taxing statutes.

The Respondent considers that the real questions presented are as follows:

1. Whether ignition coils sold for general use and not primarily adapted or specially designed for use as a component part of automobiles, motorcycles, automobile trucks, or automobile wagons were subject to tax as automobile parts or accessories under Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924.

2. Does Section 424(a) of the Revenue Act of 1928 deprive the Court of Claims of jurisdiction to review the action of the Commissioner of Internal Revenue in refus-

ing to refund excise taxes which were erroneously and illegally assessed and collected where the taxes were assumed and paid by the manufacturer and were not passed on to customers.

3. Are the findings of the Court of Claims conclusive and sufficient to support the judgment.

STATUTES AND REGULATIONS INVOLVED.

Section 900 of the Revenue Act of 1918 (40 Stat. 1057, 1122)

Section 900 of the Revenue Act of 1921 (42 Stat. 227, 291)

Section 600 of the Revenue Act of 1924 (43 Stat. 253, 322)

Section 424(a) of the Revenue Act of 1928 (45 Stat. 791, 866)

Treasury Regulations 47, Article 15 (1919)

Treasury Regulations 47, Article 15 (1921)

Treasury Regulations 47, Article 16 (1924)

The above are set out in the petition for certiorari as Appendix A.

STATEMENT.

This suit was brought by Respondent in the Court of Claims to recover manufacturers' excise taxes illegally assessed and collected for the period from April 1, 1923 to December 31, 1924, in the sum of $14,966.17, and for the period from January 1, 1925 to February 26, 1926, inclusive, in the sum of $5,051.41, a total of $20,017.58. (R. 12-13, 17.)

The amount in suit represents the unrefunded balance on claims for refund of $67,544.87. Excise taxes in the amount of $47,527.29 were previously refunded on the claims by the Government. (R. 18.)

The Respondent is a corporation and during the period from May, 1919 to May, 1926 was engaged in the manufacture and sale of ignition coils. (Findings 1, 2) (R. 16.)

None of the coils sold were specially designed for automobiles and none were sold for original equipment. (Finding 11) (R. 19.) The coils were equally adapted to marine, automobile, tractor, motor cycle, or airplane engines, and to outboard motors and engines for concrete mixers. They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component part of automobiles, motor cycles, automobile trucks or automobile wagons. (Finding 11) (R. 19.) The coils were sold for the most part to jobbers and distributors and some were sold to manufacturers, wholesalers, mail order houses and dealers. (Finding 11) (R. 19.)

During the period in question Respondent invoiced its catalogue prices to all customers, and did not add any amount representing Excise Tax, and did not collect from its customers any amount in addition to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The Excise Tax was set up by Respondent in an additional account styled "Excise Tax Expense". (Finding 7.) (R. 18.) Respondent's catalogue prices were not increased or decreased by reason of the imposition of the excise taxes on automobile parts or accessories. (Finding 9.) (R. 18.)

During the period in question the Respondent filed monthly returns of the manufacturers' excise tax and paid the taxes shown thereon on its sales of coils. (Finding 2.) (R. 16.)

Respondent duly filed claims for refund of the taxes paid on the ground that the coils were not parts for automobiles or motor cycles. (Finding 3.) (R. 17.) The claims were allowed in part and rejected in part: (Findings 3, 4, 5, 6.) (R. 17-18.) The rejection was based on the ground that the tax had been passed on to customers without refund and without submission of the bond specified in Treasury Decision 4195. (Findings 4, 5.) (R. 17.)

The Respondent did not give a bond because it had itself assumed and paid the Manufacturers' Excise Tax, and its customers had no right, title, or interest in a refund of the tax. The Respondent, during the period February 24, 1919, to April 30, 1919, had added $1,322.30 as tax on its invoices to customers. Due to the refusal of its customers to pay the tax the practice was abandoned in April, 1919. Thereafter Respondent assumed and paid the tax itself. (R. 5, 13.) No portion of the tax of $1,322.30 is sought to be recovered in this suit. (Finding 3) (R. 13, 17.)

Within the statutory period after rejection of the claims for refund, Respondent on March 25, 1929, brought suit in the Court of Claims (R. 1). The United States demurred to the petition on the ground that section 424(a) of the Revenue Act of 1928 deprived the Court of Claims of jurisdiction to review the action of the Commissioner of Internal Revenue in refusing to refund the taxes paid. (R. 12.) The Court overruled the demurrer. (R. 12), (38 Fed. (2d) 139.) The United States first filed a general traverse and later a counterclaim for the excise taxes which had previously been refunded to the Respondent. (R. 14.)

The Court of Claims made special findings of fact (R. 16-19) and entered judgment for the Respondent in the sum of $20,017.58 and dismissed the counterclaim of the United States. (R. 20-21) (2 Fed. Supp. 778.)

A petition for certiorari and motion to remand were filed on June 13, 1933.

REASONS FOR DENYING THE PETITION.

1. The law of the case has already been settled by this Court in *Universal Battery Co. v. United States*, 281 U. S. 580.

2. There are no conflicting decisions by the courts on the application of the law.

3. The case does not involve any question of general public interest or legal principle of broad and general application.

4. The case involves only questions of fact which have been fully found by the Court of Claims and are conclusive on certiorari.

5. The Court of Claims has jurisdiction over suits to recover internal revenue taxes and Section 424(a) of the Revenue Act of 1928 does not in fact limit the jurisdiction of that Court to review the action and findings of the Commissioner of Internal Revenue.

6. The taxes were assumed and paid by Respondent, were not collected from its customers and therefore no bond was required as specified in Treasury Decision 4195.

7. The counterclaim of the Government was properly dismissed because no evidence was presented in support of the claim.

ARGUMENT.

I. The Law of the Case Has Already Been Settled by This Court.

In the case of *Universal Battery Co. v. United States*, and associated cases, 281 U. S. 580, this court held that storage batteries of a type not primarily adapted for use on automobiles, and gascolators, a device alleged to be sold for general use on various types of internal combustion engines, could not be regarded as parts or accessories of automobiles unless there are affirmative findings on the issue of primary adaptation. This court said:

> "Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles." (Pages 583-584)

II. There Are No Conflicting Decisions by the Courts on the Application of the Law.

The test prescribed by Article 15 of Regulations 47, approved by this Court in *Universal Battery Co. v. United*

States, 281 U. S. 580, is whether or not the ignition coils were specially designed or primarily adapted for use in motor vehicles. If they were not, but were articles of commerce equally adapted and designed for other uses, they were not subject to the tax. On these questions of fact the findings of the Court of Claims were definite and complete.

As to the coils the Court from the evidence found:

"They were not specially designed for automobiles."

* * *

"They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, motorcyles, automobile trucks, or automobile wagons" (Finding 11, R. 19).

On such findings the judgment could only have been for the plaintiff below.

Atwater Kent Mfg. Co. v. United States, 62 C. Cls. 419;
Wells Mfg. Co. v. United States, 66 C. Cls. 283;
Milwaukee Motor Products v. United States, 66 C. Cls. 295;
Philadelphia Storage Battery Co. v. Lederer (D. C.), 21 Fed. (2d) 320;
General Lead Batteries Co. v. United States (C. Cls.), 60 Fed. (2d) 177;
Routzahn v. Willard Storage Battery Co. (C. C. A. 6), 65 Fed. (2d) 89;
Dutton & Sons v. United States (C. Cls.), 59 Fed. (2d) 839;
Anthony Co. v. United States, 73 C. Cls. 758;
Boyle Valve Co. v. United States (C. Cls.), 38 Fed. (2d) 135;
American Chain Co. v. Eaton, (D. C.) 58 Fed. (2d) 246, 248; reversed on other grounds in Eaton v. American Chain Co., 63 Fed. (2d) 783;
Electric Storage Battery Co. v. McCaughn (D. C.), 52 Fed. (2d) 205, affirmed (by C. C. A. 3) in
McCaughn v. Electric Storage Battery Co., 63 Fed. (2d) 715;

U. S. Light & Heat Corp. v. United States; Universal Storage Battery Co. v. United States; Englert Mfg. Co. v. United States; M. & M. Co. v. United States; all decided by the Court of Claims on June 5, 1933, and unreported to date.

No decision to the contrary has come to our attention.

III. The Case Therefore Cannot and Does Not Involve Any Question of General Public Interest or Legal Principle of Broad and General Application as Any Judgment Depends Upon the Particular Facts Involved.

IV. The Case Involves Only Questions of Fact Which Have Been Fully Found by the Court of Claims and Are Conclusive on Certiorari.

Rule 38, paragraph 3, of the Rules of this Court provide:

> "The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and *shall set forth the ultimate facts found from the evidence* but not the evidence from which they are found." (Italics supplied.)

The findings of the Court of Claims are full and complete. It has found all of the "ultimate facts" sufficient to support its judgment under the foregoing rule of this Court. The Court found as to the coils:

> 1. "They were not specially designed for automobiles."
>
> 2. "Plaintiff sold the ignition coils * * * for the most part to jobbers and distributors. * * * Some were sold to manufacturers, wholesalers, mail order houses and dealers."
>
> 3. "None of its coils were sold for original equipment."

4. "They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, motor cycles, automobile trucks, or automobile wagons." (Finding 11, R. 19.)

In its opinion the Court states (2 Fed. Supp. 778, 780):

> "All of plaintiff's sales of ignition coils were taxed whether they were advertised for use on automobiles or not; the entire amount of excise tax paid during the period involved had been proved; none of plaintiff's ignition coils were especially adapted for use in automobiles; none of plaintiff's ignition coils were sold by plaintiff to automobile manufacturers, dealers, or owners for use on automobiles; all of plaintiff's ignition coils were equally adapted for use on any internal-combustion engine, and as the plaintiff sold to wholesalers, jobbers, mail order houses and dealers, and as their use was general in any kind of internal-combustion engine, it was not within plaintiff's knowledge to what particular use they were put". (R. 20.)

The findings of the court are sufficient to support its judgment and are conclusive upon this Court.

Cramp & Sons, et al. v. United States, 239 U. S. 221.
Hathaway v. United States, 249 U. S. 460.
Keokuk & Hamilton Bridge Co. v. United States, 260 U. S. 125.
Milliken v. United States, 283 U. S. 15.
United States v. Anderson, 269 U. S. 422.
Rogers v. United States, 270 U. S. 154.
United States v. Swift & Co., 270 U. S. 124.

V. The Court of Claims Has Jurisdiction Over Suits to Recover Internal Revenue Taxes and Section 424 (a) of the Revenue Act of 1928 Does Not in Fact Limit the Jurisdiction of that Court to Review the Action and Findings of the Commissioner of Internal Revenue.

The broad and general jurisdiction of the Court of Claims in internal revenue tax cases has been repeatedly sustained.

> United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28.

The question of jurisdiction has been raised in similar cases, in view of section 424(a) of the Revenue Act of 1928, and the appellate courts have, in every instance, as did the court below, sustained their jurisdiction and the right to review the action of the Commissioner of Internal Revenue.

> American Chain Co. v. Eaton (D. C., Conn.) 58 Fed. (2d) 246, 248.
> Willard Storage Battery Co. v. Routzahn, (D. C. N. D. Ohio, decided Sept. 15, 1931), unreported; affirmed by (C. C. A. 3) in
> Routzahn v. Willard Storage Battery Co., 65 Fed. (2d) 89.
> Electric Storage Co. v. McCaughn, (D. C., E. D., Pa.) 52 Fed. (2d) 205, affirmed by (C. C. A. 3) in
> McCaughn v. Electric Storage Co., 63 Fed. (2d) 715.
> Boyle Valve Co. v. United States, 38 Fed. (2d) 135.
> Jefferson Electric Mfg. Co. v. United States, 38 Fed. (2d) 139.

The reasoning of the above decisions may be summarized as follows. "The determination whether the tax was collected by the manufacturer directly or indirectly from the purchaser"—namely—"added to the purchaser's price of the article * * * is an ordinary question of fact; one with respect to which the courts constantly review the Commissioner's determination and one that is involved in almost

every suit for refund." Section 424 (a) of the Revenue Act of 1928 as shown by the Report of the Ways and Means Committee of the House and properly construed, "deals not with rights of action, but with limitations upon the power of the Commissioner to make refunds", because it "no where refers to the plaintiff's right of action to recover taxes by litigation nor to the jurisdiction of the court". In other words the section is not jurisdictional but "an administrative measure for the guidance of the Commissioner" and "does not proport to contain any provision prescribing conditions under which taxes may be collected by means of a suit".

VI. The Taxes Were Assumed and Paid by Respondent, Were Not Collected from Its Customers and Therefore No Bond was Required as Specified in Treasury Decision 4195.

As the Court below aptly said when this case was before it on demurrer, 38 Fed. (2d) 139, 140.

> "Defendant overlooks the fact that the section provides that a refund may be made without a bond if it is shown that the tax was wholly borne and paid by the manufacturer. In such case no bond is necessary under subsection (a) (3)." (R. 13.)

The evidence was overwhelming and uncontradicted that the taxes were neither billed to nor collected from the customers of Respondent and the Court so found. (Findings 7-9) (R. 48.) These findings are conclusive that the tax was assumed and paid by Respondent and was not passed on to its customers.

Furthermore this is a "Manfacturers Excise Tax" and not a "Sales Tax". Therefore the taxes cannot be passed on to the customers unless the tax is "added to the purchase price of the article".

> Boyle Valve Co. v. United States, 38 Fed. (2d) 135, 137.

On the particular point the court found in the case at bar:

> "7. For the taxable period in question, viz., May 1919 to the end of February 1926 plaintiff, in the sale of ignition coils, invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in an additional account styled 'Excise Tax Expense'." (R. 18)

> "9. Plaintiff's catalogue prices were not increased or decreased by reason of the imposition of the excise tax on automobile parts or accessories." (R. 18)

The taxes do not "appear" to have been collected from Respondent's customers as suggested on Page 2 of the petition for certiorari. They were not in fact collected from its customers but were assumed and paid by Respondent and the Court of Claims so found.

VII. The Counterclaim of the Government was Properly Dismissed Because No Evidence was Presented in Support of the Claim.

Petitioner as one of the specifications of error alleges, "In dismissing the petitioner's counterclaim and giving judgment for the Respondent".

Petitioner offers no reason or argument as to why the court should not have dismissed its counterclaim and given judgment for the Respondent. The judgment is based on the court's findings by which it is supported. The dismissal of the counterclaim was the only action which the court could take because the petitioner offered no proof in support of its counterclaim and because there was no basis in fact for the counterclaim.

As stated by the court below (2 Fed. Supp. 778, 780):

> "The only question involved is whether ignition coils manufactured and sold by the plaintiff were subject to tax as automobile parts or accessories under section 900 of the Revenue Act of 1918 and 1921, and section 600 of the Revenue Act of 1924." (R. 20.)

CONCLUSION.

The answer to the "Questions Presented" on pages 1 and 2 of the petition for certiorari are obvious:

1. The taxes are not returnable to Respondent's customers because they were not collected from the customers. The evidence on this point was uncontradicted and the Court so found.

2. The Court of Claims has jurisdiction to review the action of the Commissioner of Internal Revenue and found that the taxes had not been collected from Respondent's customers and therefore were not returnable to the customers.

3. The "ultimate" finding of the Court of Claims that the coils "were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles" was proper and necessary to support its judgment and its finding is conclusive on certiorari.

The judgment of the Court of Claims was correct under the facts as proved and found. Because of the lack of conflicting court decisions on the questions involved the petition for certiorari and motion to remand should be denied.

Respectfully submitted,

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July, 1933.